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CONTENTS

I. INTRODUCTION

The landmark 2007 study *Educating Lawyers* called for a more purposeful approach to professional identity formation in legal education.[1] The series, part of the Carnegie Endowment's Preparation for the Professions Program, focused on the education of professionals in the fields of law, medicine, divinity, and engineering to examine the ways that educators induct students into the "three . . . dimensions of professional work: its way of thinking, performing, and behaving."[2] The study concluded that legal education had been successful in two of the three dimensions on

* Associate Professor of Law at Brigham Young University's J. Reuben Clark Law School. I am grateful for the leaders, presenters, and participants at the July 2018 Professional Formation Workshop "Helping Each Student Internalize the Core Values and Ideals of the Profession," sponsored by the Holloran Center for Ethical Leadership in the Profession and the University of St. Thomas Law School, and for the excellent research assistance of Amy Lynn Andrus.

1. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS 27–28 (2007).
2. *Id.* at 27.

which it had primarily focused—the lawyer's ways of thinking and performing—but had left more to chance the third dimension: the lawyer's way of being. The study called on the legal academy to be more purposeful and intentional in addressing the third dimension, or *apprenticeship* in the study's parlance, by expanding their focus from the cognitive development and skills education of law students to include curriculum and feedback for the law student's transition from student to professional.[3] The third apprenticeship means teaching students to develop the attributes of a professional lawyer's way of being and behaving; it is the focus of the professional identity formation movement that has followed.[4]

The goals of the third apprenticeship broadly encompass the lawyer's social and ethical obligations to the profession and to public institutions. As *Educating Lawyers* summarizes, the "essential goal" of this third apprenticeship is "to teach the skills and inclinations, along with the ethical standards, social roles, and responsibilities that mark the professional."[5] In 2014, the American Bar Association (ABA) incorporated the goals of professional identity formation in the revised Standards for the Program of Legal Education.[6] ABA-accredited law schools are required to establish and publish specific learning outcomes that would develop student "competency" in all dimensions of legal education, including "knowledge of the law, legal analysis, legal research, problem-solving, effective communication and 'the exercise of proper professional and ethical responsibilities.'"[7]

Professor William Sullivan, who led the study at the heart of *Educating Lawyers*, envisioned the growing emphasis on professional identity formation as having the potential to transform and reframe legal education.[8] As the legal academy develops these

3. *Id.* at 28.

4. *See, e.g.*, Neil Hamilton, *The Next Steps of a Formation-of-Student-Professional Identity Social Movement: Building Bridges Among the Three Key Stakeholders – Faculty and Staff, Students, and Legal Employers and Clients*, 14 U. ST. THOMAS L.J. 285, 285 (2018) [hereinafter *Next Steps*].

5. SULLIVAN ET AL., *supra* note 1, at 28.

6. Neil Hamilton & Sarah Schaefer, *What Legal Education Can Learn from Medical Education About Competency-Based Learning Outcomes Including Those Related to Professional Formation and Professionalism*, 29 GEO. J. LEGAL ETHICS 399, 399 (2016).

7. *Id.* at 401.

8. SULLIVAN ET AL., *supra* note 1, at 27, 31 ("The signature pedagogies of each professional field all have to confront a common task: preparing students for the complex

learning outcomes, identifies the competencies they will seek to foster, and works to assess those outcomes, legal educators must reexamine law school culture, the so-called hidden curriculum that is communicated to students throughout the institution to more intentionally address professional formation. For purposes of this Essay, I consider how the doctrinal courses might contribute to the third apprenticeship's professional formation learning outcomes. Specifically, I examine how one doctrinal course, Federal Indian Law, might serve as a representative model for ways of incorporating purposeful learning outcomes to foster the professional identity formation of law students.

In addition to developing professional identity, Federal Indian Law can also provide an important template for helping law students learn about and develop personal and professional resilience. While we are helping to form professionals, we ought to be mindful of the particular stressors and challenges that face members of our profession. With the right lens, even doctrinal classes can provide an opportunity to teach the principles and strategies of personal and professional resilience.

The story of Federal Indian Law is a story of the tribes' remarkable resilience against the perpetual legal and physical attacks on their sovereignty, culture, livelihoods, and identity. Helping students to identify the nature of the assaults tribes have weathered and assisting students to discover the principles and strategies that the tribes have used to animate their unlikely resilience add another dimension to the classroom experience and to the students' professional formation. While I focus herein on some of the unique aspects of the way this might unfold in the Federal Indian Law classroom, there are surely other substantive courses where the lens of resilience may deepen the study. For example, one can envision drawing similar lessons from the determination and resilience of the civil rights movement and its lawyers, or the environmental movement and its founding thinkers and lawyers.

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demands of professional work—to think, to perform, and to conduct themselves like professionals. The common problem of professional education is how to teach the complex ensemble of analytic thinking, skillful practice, and wise judgment on which each profession rests.").

Such lessons in resilience may prove essential for members of the legal profession. Like the practice of law, the pursuit of a legal education is stressful and difficult. A 2014 Survey of Law Student Well-Being demonstrated that "roughly one-quarter to one-third of respondents reported frequent binge drinking or misuse of drugs, and/or reported mental health challenges."[9] Once students become lawyers, particularly during their first ten years of practice, the challenges of stress and the incidence of low resilience become exacerbated.[10] The legal academy has an ethical obligation to be part of the profession's response to the crisis of mental and emotional health and substance abuse plaguing our ranks. In Part II of this Essay, I argue that the study of Federal Indian Law presents an important opportunity to teach the principles of personal and professional resilience to law students.

The Essay proceeds as follows: Part I examines the learning outcomes of professional identity formation and how those learning outcomes may be advanced by the study of Federal Indian Law; Part II examines the ways in which the study of Federal Indian Law may provide opportunities to teach the principles of personal and professional resilience; Part III concludes.

9. Jerome M. Organ et al., *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 116 (2016). In addition to the 2014 study, the authors cite several additional studies of law student well-being with distressing findings, such as "40% of third-year law students" reporting symptoms of depression and "declines in well-being during the first year." *Id.* at 117 n.1.

10. NAT'L TASK FORCE ON LAWYER WELL-BEING, THE PATH TO LAWYER WELL-BEING: PRACTICAL RECOMMENDATIONS FOR POSITIVE CHANGE 7 (2017) (citing a study of 13,000 practicing lawyers that revealed "between 21 and 36 percent qualify as problem drinkers, and that approximately 28 percent, 19 percent, and 23 percent are struggling with some level of depression, anxiety, and stress, respectively," and revealed such difficulties as "suicide, social alienation, work addition, sleep deprivation, job dissatisfaction, a 'diversity crisis,' complaints of work-life conflict, incivility, a narrowing of values so that profit predominates, and negative public perception."); *see also*, Paula Davis-Laack, *5 Things Resilient Lawyers Do Differently*, WIS. LAW., Feb. 2018, at 58.

II. PROFESSIONAL IDENTITY FORMATION AND THE STUDY OF FEDERAL INDIAN LAW

Legal educators have been compelled to focus more specifically on professional identity formation on several fronts: the changing landscape of the economics of legal education, the increasing demand from students and employers for a broader set of practical competencies from law graduates, and most immediately, the ABA's accreditation standards for the Program of Legal Education.[11] Chapter Three of the ABA law school accreditation standards governs the requirements of the Program of Legal Education. Under that Program, law schools must "maintain a rigorous program of legal education that prepares" students "for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession."[12] In 2014, the ABA modified these standards to require that law schools "establish and publish learning outcomes" that will enable them to meet these objectives.[13]

As law schools develop and implement particular learning outcomes, the learning outcomes must include, "at a minimum, . . . competency" in the "[e]xercise of proper professional and ethical responsibilities to clients and the legal system"[14] and "[o]ther professional skills needed for competent and ethical participation as a member of the legal profession."[15] In other words, ABA Standards 302(c) and 302(d) invite legal educators to establish learning outcomes geared toward the third apprenticeship—professional formation—that develops students' sense of responsibility to the profession and to the public, and to become ethical lawyers.[16]

11. AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016–2017 (2016) [hereinafter ABA STANDARDS FOR LAW SCHOOL APPROVAL], https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf.

12. *Id*. Standard 301(a).

13. *Id*. Standard 301(b); *see also* Hamilton & Schaefer, *supra* note 6.

14. ABA STANDARDS FOR LAW SCHOOL APPROVAL, *supra* note 11, Standard 302(c).

15. *Id*. Standard 302(d).

16. To that end, the ABA has offered guidance by way of interpretation of Standard 302(d) that "other professional skills[,]" to be determined by law schools, "may include skills such as interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work,

This requirement has led to a growing scholarly discussion of how to foster the skills needed for competent and ethical participation as a member of the legal profession. These learning outcomes, the ABA suggests, ought to be formulated around the core "competencies" of professional identity.[17]

Many in the professional formation movement have argued that legal education has neglected this third apprenticeship in learning outcomes and that the classroom experience, in particular, has been dedicated to the first two apprenticeships: developing cognitive capabilities, or "thinking like a lawyer," and producing practice-ready graduates with practical skills education.[18] Professor Louis Bilionis argues that the third apprenticeship can no longer be neglected in the curriculum or presumed to be passively inculcated in our students.[19] Legal educators must be as intentional and purposeful in developing professional identity as they have been in fostering these other skills in the classroom.[20]

Professor Neil W. Hamilton and Professor Jerome M. Organ, codirectors of the Holloran Center for Ethical Leadership in the Professions at the University of St. Thomas School of Law, have been at the forefront not only of theorizing the field of professional identity formation but also of developing, tracking, and assessing the learning outcomes that may be most effective for professional identity formation.[21] Professor Hamilton has identified two learning outcomes capturing the essence of professional formation in legal education: First, students should demonstrate an understanding, commitment, and "[o]wnership of [c]ontinuous [p]roactive

collaboration, cultural competency, and self-evaluation." *Id.* Interpretation 302-1 (emphasis omitted).

17. *Id.*

18. *See, e.g.*, Louis D. Bilionis, *Bringing Purposefulness to the American Law School's Support of Professional Identity Formation*, 14 U. ST. THOMAS L.J. 480, 482 (2018); William M. Sullivan, *Professional Formation as Social Movement*, 23 PROF. LAW. 26, 31 (2015).

19. Bilionis, *supra* note 18, at 482.

20. *Id.*

21. *See, e.g.*, *Next Steps*, *supra* note 4; Neil Hamilton & Jerome M. Organ, *Thirty Reflection Questions to Help Each Student Find Meaningful Employment and Develop an Integrated Professional Identity (Professional Formation)*, 83 TENN. L. REV. 843 (2016); *Welcome to the Holloran Center*, UNIV. ST. THOMAS, https://www.stthomas.edu/hollorancenter (last visited Jan. 24, 2019).

[p]rofessional [d]evelopment over a [c]areer."[22] Second, students should demonstrate an "[i]nternalization of [d]eep [r]esponsibilities to [o]thers (the client, the team, the employing organization, the legal system)."[23] It is this second foundational learning outcome of professional formation, internalizing the deep responsibility that a professional owes to those whom she serves, that I assert may be well served by incorporation into the Federal Indian Law classroom.

The obligation to identify the specific competencies of professional formation grows from these two foundational learning outcomes of professional identity formation. The idea of developing a competency model of education is borrowed in part from medical education.[24] Medical education has sought to transition from a time-in-school model to a competency model by which students are trained and assessed and evaluated on particular core professional competencies or skills.[25] The feedback the students receive is structured around their development in these competencies, including whether they have developed the attributes of the profession.[26] The desire to help students develop the attributes of medical professionals, not merely the skills, was key to the reformulation of medical education. For example, a technically skilled surgeon who has not internalized his profound duty of care to the individuals he serves is a malformed professional. As Hamilton and Sarah Schaefer write, "The medical community has . . . emphasized the existence of a fiduciary duty to the patient and the need to foster a fiduciary disposition toward the patient during the professional's education. This should also be true for the legal profession with respect to the client."[27] Hamilton and Schaefer chronicle how the medical profession developed the specific core competencies that would lead to teaching and evaluating this "fiduciary disposition" in medical students. Similarly, in legal education, there are assessment tools that may help students and educators develop their sense of duty to the profession and their commitment to the legal community, which are part of the third

22. NEIL W. HAMILTON, ROADMAP: THE LAW STUDENT'S GUIDE TO MEANINGFUL EMPLOYMENT 33–34 (2d ed. 2018) [hereinafter, ROADMAP].

23. *Id.*

24. *See* Hamilton & Schaefer, *supra* note 6, at 406–09.

25. *Id.*

26. *Id.* at 404.

27. *Id.* (citation omitted).

apprenticeship. Whereas we may have assumed in prior models of legal education that such lessons were being transmitted, we have not, as legal educators, been sufficiently explicit or intentional in teaching or assessing these attributes in our students.

In this Part, I focus on the professional formation learning outcome that seeks to foster an internalized deep responsibility to others, a "fiduciary disposition" in the words of Hamilton and Schaefer, to those whom the student or lawyer serves as a professional.[28] Hamilton has identified nine overarching competencies, or observable skills, that mark a student's progress and form components of the "deep responsibility to others" learning outcome.[29] I will address three of these competencies to illustrate how the professional formation principles may be incorporated into the substance of a doctrinal course, Federal Indian Law, just as legal reasoning skills underpin the substantive doctrinal agenda in these courses. An intentional commitment to incorporate these competencies in service of the "deep responsibility to others" learning outcome may enrich the experience of the course for educators and students and may foster important professional identity formation. The three competencies that seem to be the best fit as a focus for Federal Indian Law include commitment to others, the basics of good judgment to help clients, and cross-cultural competency. I discuss, in turn, Federal Indian Law's potential to contribute to each below.

A. Commitment to Others

In order to foster "an internalized deep responsibility to others" as a learning outcome, the professional's commitment to others is a core competency.[30] It is certainly a competency that employers and clients highly value in a lawyer, and that a developing professional

28. *Id.*

29. ROADMAP, *supra* note 22, at xi–xiii (identifying nine competencies related to internalizing the deep responsibility to others, including commitment to others, dedication and responsiveness to clients, the basics of good judgment to help clients, the basics of teamwork, commitment to the employing organization, building relationships based on trust through networking, cross-cultural competency (developing cultural competencies for the changing workplace), and listening to persuade (how attentiveness leads to value)).

30. *Id.*

should aspire to master.[31] Professor Hamilton describes this competency from the client's perspective:

> Clients want to trust that, above all else, their lawyers are dedicated to caring for them with all of their ability. In giving their trust to you as a lawyer, clients primarily "want to know that your entire focus is on them and their interests and not on you and what you can get from them."[32]

The challenge for legal educators is to find opportunities to teach this principle, not only as a skill, not only as a value, but indeed as an obligation of the profession, while also attending to the substance of the law and the skills of legal reasoning. The cases and principles of Federal Indian Law include powerful illustrations of the vulnerability of "the other" in our legal system, which can, if made explicit, help the law student make progress toward this commitment to others.

The great legal philosopher Felix Cohen, who steeped himself in the field of Federal Indian Law, lamented that tribes and tribal people had been reduced to "romantic or comic figure[s] in American history without contemporary significance."[33] Mr. Cohen observed that,

> [i]n fact, the Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.[34]

Whether the tribes were able to seek and obtain justice, or whether their concerns and grievances were subsumed to the powerful interests competing for their resources, served, for Cohen, as a measure of the equity—or inequity—in the justice system. In studying Federal Indian Law, many students are introduced, for the first time, to a narrative that challenges their conceptions of

31. *Id.* at 99.

32. *Id.* at 99–100 (quoting Greg Stephens, *Law Practice Today, How to Obtain and Retain Clients*, AM. B. ASS'N (Nov. 2012), https://www.americanbar.org/content/dam/aba/publications/law_practice_today/how-to-obtain-and-retain-clients.pdf).

33. Felix S. Cohen, *The Erosion of Indian Rights, 1950–1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953).

34. *Id.*

manifest destiny's march. The course's focus on the shifting sands of Federal Indian Law and policy provides an opportunity to consider the legal history of the United States as an exercise in the powerful seeking to dominate the vulnerable.

At the same time, the students see that many of the most consequential and harmful statutes and policies toward the Indian tribes were advocated by those who thought they had the tribes' best interests in mind. For example, the policy of allotment and assimilation of the late nineteenth and early twentieth centuries represented a consensus among both those who sought the removal of tribal interests from the path of development and expansion and those whose genuine concern was the poverty and starvation they saw among Indian people. Though motivated by conflicting impulses, the policy outcome was the same: tribes were removed from their lands and resources, children were removed from their families to be educated in the colonizer's schools, and individuals were separated from their tribal traditions and culture. Similar concerns ushered in the era of termination in the mid-twentieth century, which sought to end the federal-tribal legal relationship and to terminate tribal interests in land and governance.

This legal history is new to many law students, and many wrestle with how to think about it. It can be disenchanting and disorienting. However, as the Hopi tribe and other traditional societies have long known, there can be a powerful opportunity for profound learning in disenchantment.[35] For the Hopi, initiates are confronted with an unmasking of the symbols of their mythology to invite initiates to engage on a deeper level with the principles they are being taught.[36] They learn, in part, that their innocence has not been consciously chosen faith but naivety.

Certainly, attorneys must also develop a more sophisticated understanding of the dynamics of the distribution of American political power and the vulnerability of minority groups if they are to be effective advocates for others. Anticipating the potential of American Indian legal history to disenchant some segment of the students, one can engage with the students to invite a deeper understanding of and investment in the legal system and the role

35. CATHERINE BELL, RITUAL: PERSPECTIVES AND DIMENSIONS 58–59 (1997).
36. *Id.*

of lawyers in shaping that system and responding to inequitable distributions of power and resources.

The course invites students to empathize, to see important chapters of American history through the eyes of "the other" rather than through the lens of colonization's rationales. Inviting explicit discussion of student responses during class time can help students claim the lessons of disenchantment. Students are often eager to embrace a sense of redemption when the discussion turns to the modern federal policy of Indian self-determination. Having experienced some level of disenchantment in prior lessons, many are capable of a more nuanced discussion of the complexities of changing Indian law and policy. They are able to contextualize the continuing vulnerability of tribal peoples to the virtually unchecked plenary power of the federal government.

Another way to foster an empathy for the legal vulnerability of the other that the students respond well to, in my experience, is to assign readings that tell, from the tribal perspective, how the Indian treaties were negotiated and what they accomplished. There are many historical resources that help students understand, in vivid ways, the concept of bad faith and the reliance interests of the tribes. Drawing upon these tribal perspectives can help students understand why the tribes continue to view the federal obligations under the treaties as vital, living promises for which the tribes paid an incomprehensible price, rather than as long-ago commitments that have long since lapsed.

The Federal Indian Law classroom can thus be a potent formative experience for developing an understanding of others, which is certainly a precursor to the deep sense of responsibility to others. Students see the legal system in action: the courts sometimes acting as a counter-majoritarian check and sometimes abdicating that responsibility.[37] Both purposeful class discussions and written responses or journal opportunities can help the students reflect on the larger themes and lessons of the cases and history.

37. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

B. The Basics of Good Judgment to Help Clients

Another key competency that a law student must develop includes the basics of good judgment to help clients.[38] Professor Hamilton identifies four major elements of this competency. Good judgment involves the ability to recognize and evaluate risks and problems, and to propose alternative courses of action;[39] creativity and strategic thinking;[40] "understanding the client's best interests in the larger context";[41] and the ability and willingness to ask for help and seek feedback, particularly when learning from bad judgment and mistakes.[42] The Federal Indian Law classroom also provides a template for developing this competency.

One of the quirks of Federal Indian Law is that although there are 573 federally recognized tribes of widely varying sizes (both in population and resources), interests, and cultures, one tribe's legal case can have devastating (or beneficial) precedential effect on all the other tribes. A number of significant Indian law cases offer the opportunity to review and learn from the judgment and strategies of lawyers, not only in the case at hand but in the subsequent responses and creative legal strategies of the tribes in the aftermath.

Tribes and tribal interests have lost a lot of critical cases, but the study of Federal Indian Law models how tribes (and their lawyers) have leveraged those losses to pursue new legal strategies and to cobble together winning legal arguments from the shards of lost cases. For example, in two of the foundational cases of Federal Indian Law known as the Marshall trilogy, the tribal interests lose in significant, early pronouncements by the Supreme Court about the legal nature and status of tribes. In *Johnson v. M'Intosh*, Chief Justice John Marshall concluded that the European doctrine of discovery, to which the United States acceded, had deprived tribes of critical rights to property, including the right to freely convey title.[43] That right, the Court wrote, was subsumed in the superior legal right of the "Conqueror" (i.e., the United States) to exclusively

38. ROADMAP, *supra* note 22, at 113–23.
39. *Id.* at 113.
40. *Id.*
41. *Id.*
42. *Id.* at 116, 119.
43. Johnson v. M'Intosh, 21 U.S. (1 Wheat.) 543, 567–68 (1823).

extinguish tribal title.[44] The "courts of the Conqueror" would therefore not recognize title conveyed by tribes to private parties.[45] Notwithstanding this profound legal defeat of the tribal interest, and the troubling, racist language and theories upon which it was built, tribes continue to use *Johnson* to assert their sovereign, albeit diminished, legal status. *Johnson* became a shard from which tribes could build their relationship with the United States as legal entities with whom the United States could deal on a government-to-government basis.

Similarly, in *Cherokee Nation v. Georgia*,[46] the Supreme Court declined original jurisdiction under Article III of the Constitution. Although the Court accepted the tribe's reasoning that it was not a *state* in the same sense as Georgia, and that tribal members were not citizens, it rejected the conclusion urged by the tribe that its status as a kind of foreign sovereign could trigger the Court's jurisdiction.[47] The Supreme Court, in rejecting this reasoning, observed that the Cherokee Nation, like other tribes, was a unique, *sui generis* legal entity: a domestic dependent nation, possessed of self-governing power, though subject to the ultimate sovereignty of the United States.[48] Tribes have built upon this theory to assert their rights to self-governance and their rights to the federal-tribal trust relationship, in which the tribes have some claim on the protection of the United States.

Many such examples provide opportunities to learn from the creative legal strategies of tribes to influence policy from a position of disadvantage and to use even adverse precedent to build a legal framework using those tools available to them. A focus on these principles and strategies can help law students develop competent judgment, including the ability to think broadly about the consequences of particular decisions in the legal context and to learn from losses and mistakes.

44. *Id.* at 588.
45. *See id.*
46. Cherokee Nation v. Georgia, 30 U.S. (1 Pet.) 1, 17 (1831).
47. *Id.* at 19.
48. *Id.* at 17–18.

C. Cross-Cultural Competency

A third competency that contributes to an internalized deep responsibility to others is the ability to communicate with, understand, and connect with people from various cultures.[49] Culture in this context means not only variations in language, country of origin, or religion; it "can include a person's age, gender, ethnicity, sexual orientation, or physical ability."[50] Each of these perceived differences can present a potential barrier that a competent lawyer must be prepared to overcome. Professor Hamilton writes:

> For a lawyer to truly provide competent representation to his or her clients, the lawyer must not only understand the law but also understand the culture of the client, of the teams and other groups with whom the lawyer works to advance the client's interest, and of adversaries and decision makers whom the lawyer seeks to influence. Without awareness of the various cultures of these stakeholders in a lawyer's work, a lawyer cannot see how culture affects the representation.[51]

The study of Federal Indian Law brings questions of cultural competence and cross-cultural communication to the fore for law students. Professor Hamilton describes several models of cross-cultural competence with somewhat overlapping measures for the progress of a student from novice to competent professional.[52] According to one model, cross-cultural competence involves moving a student or novice from ethnocentric ways of thinking to a more adaptive, even integrated cultural fluency where people are aware of cultural differences and "try to consciously adapt to the cultural norms of the surrounding environment."[53]

The whole semester of Federal Indian Law can be a lesson in developing cross-cultural understanding and competence, as students, particularly students from non-Native backgrounds, encounter the legal system through the lens of the Native experience. The educator's challenge is to make these lessons concrete and explicit

49. ROADMAP, *supra* note 22, at 165–66.
50. *Id.*
51. *Id.* at 166.
52. *Id.* at 169–74.
53. *Id.* at 169, 171.

throughout the course and to provide opportunities for reflection and feedback on this competency in interactions with students.

One challenge I have noticed as a tribal member (Seneca) teaching Federal Indian Law is an occasional reluctance on the part of class members to voice views they think may be contrary to my own, or that they worry may offend me as a Native person. However, I am focused on teaching the substance of the law without intending to color that experience for students with my own views. I work to make explicit my expectation that the classroom is a space where students can explore ideas from every perspective, and that while the discussion should always remain respectful, students should feel free to broadly explore and challenge ideas.

Two aspects of Federal Indian Law facilitate opportunities to develop cross-cultural competency in particular. The case of *Santa Clara Pueblo v. Martinez*[54] presents a very sympathetic plaintiff: a woman from the Santa Clara Pueblo whose children are not eligible for membership in the tribe because of the tribe's patrilineal rules for enrollment. She sought enrollment for her children who were raised on the Pueblo's territory, in part so that they could fully access the tribe's health facilities. The tribe initially declined that application, and she sued under the Indian Civil Rights Act (ICRA), alleging that the tribe had denied her the equal protection of the laws on the basis of her sex, in violation of ICRA. It is clear that the Pueblo had one set of enrollment laws that benefitted men and deprived women of that same right to the enrollment of their children. The case presents students with an uncomfortable dilemma about culture. Most law students have a cultural expectation that the law must treat men and women equally in nearly every regard. In *Santa Clara Pueblo*, they must confront whether a tribe has a right to a contrary cultural value and whether they are willing to see the tribal right to cultural sovereignty vindicated. The Supreme Court held that ICRA did not provide a federal cause of action for the plaintiff to sue the tribe in federal court and that the Tribe's sovereign immunity instead barred federal review of her ICRA equal rights claim. The discussion of

54. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (holding that the Indian Civil Rights Act did not waive tribal sovereign immunity for an equal protection challenge to the tribal enrollment criteria).

Santa Clara Pueblo presents an opportunity to have meaningful discussions of cultural differences and tolerance. It provides the opportunity to discuss principles of tribal sovereignty, and whether the United States is willing to stand by that principle even when cultural differences may mean that others disagree with the ways in which tribes exercise that sovereignty.

Similarly, students have the opportunity to contemplate cultural values in studying the Indian Child Welfare Act (ICWA).[55] ICWA is a federal statute that grants jurisdiction and standing, in certain circumstances, to tribes to participate in the placement of Indian children in foster care and adoptions. Some students have raised cultural concerns in reading cases where the choices of biological parents may be checked by the interest of the tribe in the children. This, they sometimes say, seems to compromise a fundamental individual right in one's biological children and elevates the tribe's legal interest in children. ICWA cases and the principles underlying the statute are an exercise in understanding the unique cultural values among many tribal members. The statute reflects the tribal value recognizing the significant cultural—and legal—interest of the tribe in children eligible for tribal membership.

These classroom discussions are opportunities to develop the skills and attributes of cross-cultural competence and to make purposeful progress in helping students develop this competency. While certainly there are many other strategies and avenues for implementing the professional identity formation learning outcomes, this Essay seeks to begin a discussion of such opportunities in doctrinal courses and, in particular, examines how such opportunities may be developed in Federal Indian Law.

The next section addresses the ways that the study of Federal Indian Law may help foster personal and professional resilience in law students.

55. 25 U.S.C. §§ 1901–1963 (1978) (providing for tribal court jurisdiction in placements of Indian children).

III. CULTIVATING RESILIENCE THROUGH THE STUDY OF FEDERAL INDIAN LAW

The enduring presence of Indians and Indian tribes would likely be among the more surprising facts of modern life for those of the founding era. American law and policy anticipated that what they called the "Indian problem" would go away as the Indian people and their tribal organizations and their claims to sovereignty were decimated by disease, disbanded after displacement, or dissolved under the weight of forced assimilation. The expectation of tribes' inevitable disappearance was not just a widely shared value among Americans, it has been a goal explicitly enacted in American Indian law and policy for most of the nation's history. Still, tribes and tribal people endure as cultural, political, and legal entities.

In studying Federal Indian Law, one valuable exercise is to interrogate what principles and attributes enabled this remarkable survival. More specifically, the crisis of resilience and the challenges to the well-being of law students and lawyers demand that we seize every opportunity within the curriculum to encourage the development of resilience in students. In the story of tribal survival, students can find principles of personal and professional resilience to not only weather assaults but to heal and grow in strength after challenges.

One consistent trait of the resilient is the ability to adapt to change.[56] Resilience expert Paula Davis-Laack suggests that the attributes of resilience, particularly for members of the legal profession, rest on "two main building blocks . . . 1) thinking flexibly about challenges and framing adversity in an accurate way; and 2) developing high-quality connections with others."[57]

First, the study of Federal Indian Law can help law students to think flexibly about challenges and to frame adversity in an accurate way. By drawing out the lessons of the tribes' legal and cultural adversity and their survival strategies, the classroom discussion becomes a way to purposefully develop an understanding of resilience attributes and strategies. Such lessons are available in discussions of the history of Federal Indian policy and

56. Davis-Laack, *supra* note 10, at 58.
57. *Id.*

the adaptive strategies of the tribes to those forces over which they had little control. Tribes have had to be adaptive and flexible as their reality and circumstances have changed in many unwelcome ways; they have turned defeats into victories, sometimes through a slow and painstaking process, and they have learned to adapt the tools at their disposal to be as proactive as possible in shaping their circumstances.

Tribes have modeled using adverse precedent to find the next argument following defeat and to cobble together a legal strategy from the remnants of loss. As discussed above in section II.B, tribes used the cases of the Marshall trilogy to build a foundation for future strategies vindicating their enduring sovereignty.[58] The Supreme Court declared that because of conquest, the tribes had been divested of some aspects of external sovereignty.[59] But the tribes have since asserted that their internal sovereignty not only endures but is broad, even if they may not have the power to negotiate international treaties.

Having been labeled domestic dependent nations by the Supreme Court, tribes have at various times called upon the trust responsibility of the United States incumbent in this guardian-ward relationship.[60] At times, they have also asserted their nationality rather than their domestic dependence to exercise governing jurisdiction over people and territory.[61]

Faced with pressure from all sides to assimilate and disband, a great many tribes have endured. They faced, and continue to face, legal threats without succumbing to them as existential threats. Tribes have regrouped after legal defeats and reached for new tools such as political advocacy and coalition building. As Davis-Laack might describe it, they have been flexible in their thinking and response to adverse circumstances, confronting the difficult realities without abandoning their essential identities and cultures.

58. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (1 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (1 Pet.) 1 (1831).

59. *Johnson*, 21 U.S. (1 Wheat.) 543.

60. *See, e.g.*, Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1230–31 (1975) (discussing cases and principles under which federal actors are accountable as trustees of Indian tribes).

61. *See, e.g.*, Williams v. Lee, 358 U.S. 217, 219–20 (1959) (relying on the Marshall Trilogy of cases to hold that tribes retain jurisdiction over internal affairs, including the "right . . . to make their own laws and be ruled by them").

They are resilient. Such flexible thinking and long-term perspective-taking can assist law students (and lawyers) to deal with setbacks. In responding to insult and injury as tribes have done, lawyers may frame such experiences as temporary, or as perhaps containing the seeds of new strategies for moving forward.

Second, the tribes responded to their history of assaults, particularly in the threats posed by assimilation and termination, by turning to long-held cultural values and their essential identities as tribal communities. The tribes were determined to cling to tribal identity and values, even as the United States was determined to eradicate those bonds.

As part of the strategy to force tribal assimilation, the United States established boarding schools for Indian children with the stated aim to "kill the Indian" in the children.[62] They were punished for speaking their language. Their hair was cut. They were removed from their families, sacred traditions, and homelands. They were trained as domestic servants. The cultural and personal devastation of the policy still reverberates through tribal life. Tribes continue to work to heal the profound wounds of this policy on tribal lives and families.

But the tribes worked to propose a legislative solution to ensure that their children, their most precious tribal resource, would be protected in the future. In 1978, Congress passed the Indian Child Welfare Act to empower tribal interests in their children and to protect tribal children.[63] ICWA also establishes substantive and procedural protections for tribal children who may be in the custody of a state.[64] The tribes used the tools that were available to them—the legislative process and political advocacy—to win a favorable result and redress a historical wrong. The legislation reflected the values of the tribes in preserving tribal cohesion and identity for their children. In this way, the tribes have modeled coalition building to align across competing interests to gain a broader base of support and maximize their ability to wield political influence.

62. AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880–1900, at 261 (Francis Paul Prucha ed., 1973).

63. 25 U.S.C. §§ 1901–1963 (1978).

64. *Id.*

Tribes have infused their approach to governance with their cultural values with regard to their community-based justice systems as well. Tribes specifically seek to build resilience in tribal members and communities through healing and wellness programs.[65] Rather than isolating offenders who may struggle with addiction, tribal wellness courts offer the opportunity to reintegrate in the community and to seek healing. Similarly, healing may be found for struggling law students and lawyers in seeking community and understanding, rather than becoming isolated and overwhelmed by personal and professional struggles.

These examples of tribes drawing strength from the community and clinging to their values show law students a different point of view from the individualism that permeates western legal systems. In a profession that can be isolating and lonely, finding community and drawing upon the values of that community may be one key to building more resilient law students and lawyers.

Indeed, there are many lessons in resilience lying within the pages of Federal Indian Law casebooks that may be highlighted as an overarching theme. I have touched here on but a few representative examples. Similar lessons might be found in the lives and humanity of the stories behind other doctrinal courses. Such lessons may prove valuable as law students strive to build their own resilience strategies.

IV. CONCLUSION

As the legal academy develops professional identity learning outcomes and strategies for achieving those outcomes, the whole of the curriculum and culture of legal education should be examined for opportunities to develop the key competencies inherent in those learning outcomes. For me, this means reexamining the strategies for doctrinal instruction to incorporate the principles of professional identity formation and to be purposeful in creating growth opportunities for the students I serve. In particular, the study of Federal Indian Law presents a model for how to think about incorporating professional identity formation into a doctrinal

65. *See, e.g.*, *Healing to Wellness Court*, TRIBAL ACCESS TO JUST. INNOVATION, http://www.tribaljustice.org/places/specialized-court-projects/healing-to-wellness-court/ (last visited Jan. 24, 2019).

course. At the same time, the legal academy must take additional steps to help build resilience among law students and lawyers to respond to the crisis of well-being that plagues the profession. These goals, furthering the competencies of professional identity formation and building resilience, may be served by a reexamination of the cases and principles we are already teaching and amplifying the lessons inherent for the third apprenticeship in doctrinal coursework.